SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
SEP 16 1963
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1963.

No. 469

GEORGE ABERNATHY,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

JAY B. WHITE,
500 Lawyers Building,
Cleveland, Ohio,
Attorney for Petitioner.

JAMES R. WILLIS,
1404 East Ninth Street,
202 Cleveland Transit Building,
Cleveland 14, Ohio,
Of Counsel.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 1-5647

TABLE OF CONTENTS.

Opinions of the Court Below 1

Statement of the Grounds on Which the Jurisdiction of This Court Is Invoked 2

Question Presented for Review 2

Constitutional Provisions Which the Case Involves 3

Statement of the Case 4

State of the Proceedings at Which and Manner in Which the Federal Question Sought to Be Reviewed Was Raised 7

Arguments Relied for the Allowance of the Writ 7

If an Arrest Is Unlawful, the Incidental Search Is Unreasonable and the Product of the Unreasonable Search Is Not Admissible to Convict 8

A Reasonable Search Is a Search Which a Judicial Officer Has, in Advance, Certified as Reasonable and for Which He Has Defined the Object and Fixed the Boundaries. 10

If A Search Is Unreasonable For Any Reason, the Seizure of Any Evidence, Whether Contraband or Mere Evidence, Violates the Fourth Amendment 12

Where the Identity of an Alleged Informer Is Material to the Establishment of Probable Cause, the Court Should Require Disclosure 14

Conclusion 17

Appendices:

I. Order of Supreme Court of Ohio Dismissing Appeal 19

II. Order of the Supreme Court Overruling Motion for Leave to Appeal 19

III. Journal Entry of the Court of Appeals of Ohio, Eighth District, County of Cuyahoga 19

TABLE OF AUTHORITIES

Cases.

Agnello v. United States, 269 U. S. 33 (1925) 10, 11

Burks v. United States, 287 Fed. (2) 117 12

Draper v. United States, 358 U. S. 307 (1959) 9, 15

Giordenello v. United States, 357 U. S. 480 (1958) 9

Goldman v. United States, 316 U. S. 129 (1942) 12

Henry v. United States, 361 U. S. 98 (1959) 8

Johnson v. United States, 333 U. S. 10 (1947) 12-13

Jones v. United States, 357 U. S. 493 (1958) 10

Jones v. United States, 362 U. S. 257 (1960) 8, 13, 14-15

McDonald v. United States, 335 U. S. 451 (1948) 12

Miller v. United States, 357 U. S. 301 (1958) 14

On Lee v. United States, 343 747 (1952) 12

People vs. Lawrence, 149 Cal. App. (2d) 435, 308 Pac. (2) 821 (1959) 16

Priestly vs. Superior Court, 50 Cal. (2d) 812, 317 Pac. (2) 796 (1957) 16

Roviaro v. United States, 353 U. S. 53 (1957) 16

Sgro v. United States, 287 U. S. 206 (1932) 13

Silverman v. United States, 287 U. S. 505 (1961) 12

Story, Re, 159 Ohio St. 144, 111 N. E. (2) 385 (1953) 15

United States vs. Blich, 45 Fed. (2d) 627 (1930, DC Wyo.) 16

United States v. Jeffers, 342 U. S. 49 (1951) 8

Wong Sun v. United States, 137 U. S. 471 (1963) 10

Texts.

McCormick on Evidence, § 148 15

Constitution.

Constitution of the United States:

Fourth Amendment 2, 3, 7, 11, 12

Fifth Amendment 7

Fourteenth Amendment 2, 3

Statutes.

Ohio Revised Code:

Sec. 2317.02 15

Sec. 2933.21 *et seq.* 13

Sec. 2933.22-27 ..... 10, 15

Sec. 2935.03 ..... 8, 9

Sec. 2935.07 8

Sec. 2935.12 13

Sec. 3719.02 4

28 U. S. C. A., § 1257(3) 2

In the Supreme Court of the United States

OCTOBER TERM, 1963.

No.

GEORGE ABERNATHY,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States of America:

The petitioner George Abernathy prays that a writ of certiorari issue to review the judgments of the Supreme Court of Ohio made and entered by said Court on the nineteenth day of June, 1963, which judgments are appended here as Appendixes I and II.

OPINIONS OF THE COURT BELOW.

No opinion was rendered by the Trial Court.

The Ohio Court of Appeals upon consideration of an appeal to it likewise did not render either an official or unofficial opinion, save a mere journal entry affirming the judgment of the Trial Court. (See Appendix III.)

No formal opinion was rendered by the Supreme Court of Ohio and Petitioner's Motion for Leave to Appeal and his Appeal as of Right were dismissed. Copies of these entries made by the Supreme Court of Ohio were referred to above, i.e., Appendixes I and II.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

The jurisdiction of this Court is invoked under Title 28 U. S. C. A., § 1257(3), which section pertinently provides:

> "Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows: * * *, (3) by writ of certiorari * * * or where any title, right, privilege or immunity is specially set up is claimed under the constitution."

This cause also involves the introduction in a state court of evidence seized in violation of the Fourth and Fourteenth Amendments of the United States Constitution.

QUESTION PRESENTED FOR REVIEW.

I.

Where local police officers, without a warrant either to arrest or search, and also while acting without probable cause to arrest, forcibly enter a private apartment and place all of the occupants, including the accused, under arrest, following which they seized from him certain contraband, have the federally guaranteed rights of such an accused been violated?

II.

May the contraband, i.e., narcotics, seized by local police officers under the circumstance of this cause, be introduced into evidence in a state court prosecution for possession of such contraband?

III.

Must the identity of an alleged informer be disclosed for a fair determination of the question of probable cause, where the local police officers claim they have confidential information from such informer, upon which they rely as a predicate for forcibly entering, without a warrant, a private apartment and arresting and searching the occupants?

IV.

Where no exigent circumstances are shown, can a private dwelling be searched without a warrant?

CONSTITUTIONAL PROVISIONS WHICH THE CASE INVOLVES.

The Fourth Amendment to the Constitution of the United States provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fourteenth Amendment to the Constitution of the United States provides:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United *States; nor shall any State deprive any person of life, liberty or property, without due process of law;* nor deny to any person within its jurisdiction the equal protection of the laws." (Emphasis added.)

STATEMENT OF THE CASE.

George Abernathy was indicted for and convicted of a violation of R. C. of Ohio, § 3719.02, wherein it was charged that on the 16th day of August, 1961, he had in his possession, or under his control, certain illegal narcotic drugs. Prior to trial the Petitioner filed his written Motion to Suppress certain evidence, which evidence, it was alleged, had been seized in violation of the Fourth Amendment to the United States Constitution, and that the use of evidence seized in defiance of the Constitution "is by that same authority inadmissible." This Motion, following an oral hearing, was denied. Also following a bench trial on the merits, the Petitioner was convicted and subsequently sentenced to the Ohio Penitentiary for an indeterminate period.

In due season Petitioner filed his Motion for a New Trial which was overruled and further perfected his appeal herein. The Ohio Court of Appeals, without an opinion, merely affirmed the conviction. In the Supreme Court of Ohio this Petitioner's Motion for Leave to Appeal was denied and his Appeal as of Right dismissed.

The transcript of the trial evidence hereinafter referred to as (R) shows as follows:

To support the allegations made in his Motion to Suppress, the defense called two of the arresting officers, i.e., Detectives Thompson and Jones. Both of these officers were members of the Cleveland Police Narcotic Squad and had reported for work on this date in question at or around 10 o'clock P.M.

Detective Thompson indicated in his testimony that they remained in the office for about two hours and fifteen minutes before leaving, and that when they did leave, their destination was 2025 East 77th Street (R. 9). This was the address where the Petitioner was arrested. Also ar-

rested at this time and place were one Leonard Ashford and Richard Williams, the tenant at that address (R. 12).

Detective Jones next gave evidence to the effect that they had received a call from an "informer" that directed them to this address (R. 19), and that they had gained entrance to apartment No. 22 after having listened in the private hallway for about 10 minutes to the conversation being held inside, and that upon hearing the word "smack" used they gained entrance after knocking on the door and identifying themselves as police officers. The officer further said that immediately upon entering they placed all the persons on the premises under arrest for narcotics (R. 15). More, that after placing them under arrest, they proceeded to search the apartment (R. 15).

More specifically, this officer testified (R. 17) that:

"Q. Prior to placing Mr. Abernathy under arrest you did not see anything that was secreted in his pockets, did you?

A. No, sir.

Q. And it was after these persons were placed under arrest that you conducted a thorough search of the premises, you and your brother officers?

A. Yes.

Q. Then all of the items that were found were found after you had entered the apartment?

A. Yes.

Q. And they were also found after you placed the persons inside the apartment under arrest?

A. Yes."

The Petitioner testified that he was visiting the home of Richard Williams and was seated on the couch when suddenly he heard the "tremendously loud knocking on the door" by the police demanding entrance and that when they did enter, it was with pistols drawn; whereupon, they forced all of them to sit on the couch with their hands up (R. 22).

For its evidence on the issues raised by our Motion, the State called Detective Thompson, who indicated that he had received a call from some "informer" to the effect that Richard Williams, Leonard Ashford and a fellow from Chicago had gone over to Williams' house to use some "stuff" (R. 36). Also, that upon receipt of this call, they went directly to the Williams' address, i.e., apartment No. 22, located on the third floor of this large apartment building (R. 39). It was further developed that there was a door at the front of the building proper through which entrance is gained to a corridor which in turn permitted visitors to use the stairs or the elevator to the upper floors (R. 39).

The officer was emphatic on the point that in going to this address he was relying exclusively on the reliability of his informer, and that when they entered into the hallways of the building, it was in reliance on the information that had been given them by the informer (R. 40).

Upon cross examination this officer was specifically asked to disclose the identity of this alleged informer (R. 41). To this quest for disclosure, the Court sustained an objection raised by the State to which a specific exception was taken (R. 40, 41).

Officer Thompson admitted that no effort was made to procure a search warrant, claiming instead that it would have been useless to do so (R. 40).

STATE OF THE PROCEEDINGS AT WHICH AND MANNER IN WHICH THE FEDERAL QUESTION SOUGHT TO BE REVIEWED WAS RAISED.

Prior to trial Petitioner filed a Motion to Suppress the evidence on the ground that the arrest and subsequent search of the Petitioner was illegal and unconstitutional. Further that the search conducted was general and/or exploratory and that the use of any evidence so seized infringed on Petitioner's constitutional rights under the Fourth and Fifth Amendments of the United States Constitution.

These issues were further briefed and argued in the Trial Court, the Ohio Court of Appeals as well as the Supreme Court of Ohio. The Supreme Court of Ohio without the citation of any authorities dismissed these arguments with the notation:

> "The appeal as of right herein is dismissed for the reason that no debatable constitutional question is involved."

ARGUMENTS RELIED FOR THE ALLOWANCE OF THE WRIT.

Now the specific question raised by Petitioner's Motion to Suppress was essentially this: Was the arrest of the defendant and the search of the premises legal? If in fact the evidence sought to be suppressed by the Motion was obtained by an illegal search and seizure, it is not admissible over objections, by reason of the constitutional guarantees against illegal searches and seizures (invasion of privacy) and/or against self incrimination.

If an Arrest Is Unlawful, the Incidental Search Is Unreasonable and the Product of the Unreasonable Search Is Not Admissible to Convict.

I.

In resolving the question of legality, we start with the premise that a search which is unlawful in the beginning is not made lawful by what it discloses; *Henry v. United States*, 361 U. S. 98 (1959); or even by the discovery and seizure of contraband articles. *United States v. Jeffers*, 342 U. S. 49 (1951). Further, it is not necessary even that a defendant concede possession in his Motion to Suppress. *Jones v. United States*, 362 U. S. 257 (1960).

Legal searches are those conducted pursuant to a legal search warrant, or pursuant to a legal arrest, or with the consent of the suspect or of someone who has authority to consent to a search of the premises. Suffice it to say that in this whole area the greatest source of controversy involves a search made without a search warrant but pursuant to an arrest made without an arrest warrant. Such an arrest is generally valid (when such is the case a search incident thereto, if reasonable, is also valid) if it is for even a misdemeanor committed in the officer's presence. Cf. Revised Code of Ohio, § 2935.03 and § 2935.07.

Revised Code of Ohio 2935.03 provides:

> "A * * * police officer shall arrest and detain a person found violating a law of the State or an ordinance of a municipal corporation until a warrant can be obtained."

Revised Code of Ohio 2935.07 provides:

> "When an arrest is made without a warrant by an officer, he shall inform the person arrested of such

officers authority to make the arrest and the cause of the arrest * * *."

The evidence here is clear that at the point when the Petitioner and others were placed under arrest, they were not found violating a law of the State or an ordinance of the City, nor were they informed as to the cause of their arrest. Viewed from this posture, the conclusion is most compelling that the arrest was illegal in that the statutory grounds for an arrest without a warrant were not present.

II.

If the contention is made that R. C. of Ohio, § 2935.03 refers to misdemeanors and that it has always been the law that an officer who has "reasonable grounds" to believe that a felony has been or is being committed by a particular person, may validly arrest such person without a warrant; admittedly, in such a case the ensuing search reasonably incident to the arrest is not constitutionally unreasonable.

However, "reasonable ground" is synonymous with probable cause and exists when a man of reasonable caution would believe an offense is being or has been committed. The current test is whether a reasonable and prudent man in possession of the knowledge which has come to the arresting officer, would believe the person arrested is guilty of a criminal offense. *Draper v. United States*, 358 U. S. 307 (1959).

Measured by this standard it is cogently clear that there is here a complete lack of "probable cause," which really tends to force the conclusion that the real reason no warrant was sought was because the officers knew they could not qualify for the issuance thereof. See, *Giordenello v. United States*, 357 U. S. 480 (1958). The question then is whether or not this Court should rule that it takes

less evidence in Ohio to arrest and search without a warrant than it takes to do so with one. See Revised Code of Ohio, § 2933.22-2933.27. Cf., *Wong Sun v. United States*, 137 U. S. 471, 479-480, (1963).

A Reasonable Search Is a Search Which a Judicial Officer Has, in Advance, Certified as Reasonable and for Which He Has Defined the Object and Fixed the Boundaries.

Even if we assume that the officers here involved had probable cause for belief that contraband evidence subject to seizure was in the apartment, the doctrine is well settled: No degree of probable cause will allow a search of a home without a warrant. *Agnello v. United States*, 269 U. S. 33 (1925).

In *Agnello* cited above this Court ruled:

> "Save in certain cases as incident to arrest, there is no sanction in the decisions of the Courts, federal or state, for the search of a private dwelling house without a warrant * * *. Belief, however well-founded, that an article sought is in a dwelling house furnishes no justification for a search of that place without a warrant. And such searches are held unlawful notwithstanding facts unquestionably showing probable cause."

More recently, in *Jones v. United States*, 357 U. S. 493, 497 (1958) this Court, citing *Agnello* as its prime authority, held that the fact that the officers had probable cause to believe that defendant's house contained material being used in the commission of a crime was insufficient to justify the search without a warrant. In the words of that opinion: "* * * were officers free to search without a warrant merely upon probable cause to believe certain articles were within a home, the provisions of the Fourth

Amendment would be empty phrases and the protection it affords largely nullified."

Conceding that the fundamental purpose of the Fourth Amendment is to interpose the disinterested determination of a magistrate between the zeal of the police and the right to privacy, then surely the requirements of this guarantee cannot be met, by showing, as was attempted here, after the search, either that there must have been probable cause because the search bore fruit or that there was ample evidence to justify the issuance of a warrant —therefore none was required.

The Cleveland Police unfortunately are quick to assume that when they are convinced that they have unquestionable grounds to support a search, that obtaining a warrant in advance is a formality with which they can dispense for the sake of expediency. In their thinking on this score, it can be said that the extreme reluctance of Ohio's Courts (both Trial and Appellate) to openly condemn such tactics, and free oft-times obviously guilty defendants, has had the effect of a tacit approval thereof. This situation has been compounded by the lack of any really definitive opinions from the higher courts of Ohio on the myriad of problems under the doctrines of illegal searches and seizures. A perfect example of this is the cause here. Surely the issues raised herein were at least worthy of discussion by the Appellate Courts in the form of an opinion. For aught that appears these Courts, i.e., the Trial Court, Court of Appeals and the Ohio Supreme Court, could very well have based their reasoning on some constitutionally untenable theory.

The rule above referred to, as enunciated in *Agnello*, is emphatically to the point that: No officer may enter premises unless probable cause to arrest exists before such entry. This of course includes hallways of apartment,

outer doors, yards and the curtilage of private premises. Thus if entry is made into such a hallway merely to observe, and thus obtain "probable cause," the entry, the arrest and the incidental search are unlawful. *McDonald v. United States*, 335 U. S. 451, 454 (1948); *Burks v. United States*, 287 Fed. (2) 117, 124.

As regards this element of trespass, in *Silverman v. United States*, 365 U. S. 505 (1961), this Court ruled on the constitutionality, under the Fourth Amendment, of the use of a "spike microphone." This decision was perforce "based upon the reality of an actual intrusion into a constitutionally protected area." In taking this position, the Court obviously felt that the fact of an actual trespass distinguished *Silverman* from *On Lee v. United States*, 343 U. S. 747 (1952) where a narcotic agent with a concealed microphone on his person was invited onto the premises of the accused; and *Goldman v. United States*, 316 U. S. 129 (1942), where an amplifier was held next to a common wall. In these latter cited cases, i.e., *On Lee* and *Goldman*, the Court viewed the absence of an actual or even technical trespass as the basis for their decision that the amendment had not been violated. Surely the actual trespass here places this cause within the scope of *Silverman*.

If A Search Is Unreasonable For Any Reason, the Seizure of Any Evidence, Whether Contraband or Mere Evidence, Violates the Fourth Amendment.

In determining the question or reasonableness, where as here, the facts and circumstances establish that there was sufficient opportunity to obtain a warrant such will render the search unreasonable. A very limited exception to this rule is operative when the circumstances compel an immediate arrest on the premises. *Johnson v. United*

States, 333 U. S. 10 (1947). However, where, as here, the officers know in advance they will make a search of the premises, no excuse can justify not obtaining a warrant, provided they can qualify for one. And surely, if they cannot so qualify, they should not attempt the search.

This then brings forth the following query; that is, could the officers, on the facts known to them at the time of their original entry, have qualified for the issuance of a search warrant? For surely if it were not sufficient to qualify for an arrest warrant then it could not possibly be deemed probable cause to arrest without one. In this regard the following analysis is deemed significant.

First, search warrants are authorized under R. C. of Ohio, § 2933.21 et seq. Because these statutes protect the constitutional right to privacy, strict compliance is required and must be strictly construed. *Sgro v. United States*, 287 U. S. 206 (1932). Next, the Fourth Amendment and our State counterpart provides:

> "And no warrant shall issue but upon probable cause supported by oath or affirmation * * *."

It is submitted that on this "alleged" information no neutral and detached magistrate would have issued warrant to search these premises or to arrest anyone. Accordingly it has been said that: "* * * unless the magistrate makes his independent judgment on all the known facts, then he tends to become merely the tool of police interest." *Jones v. United States*, 362 U. S. 257, 273 (1960).

On the other hand, let's assume that the officers had a warrant. Our code specifically provides that an officer may break down an outer door or inner door or window of a dwelling house or building if after notice of his intention to make a search pursuant to a warrant he is refused admittance. R. C. of Ohio, § 2935.12. This formality,

which requires the police to say who they are and state why they demand admittance, is of ancient vintage, going all the way back to the 15th century in the English Common Law. Thus, an otherwise valid search can deteriorate into the zone of "unreasonableness" merely by failure to comply with the statute relative to execution thereof. Of considerable importance in this phase of our contentions is the case of *Miller v. United States*, 357 U. S. 301 (1958). In *Miller* this Court reversed the conviction of a notorious, and undoubtedly guilty, narcotic peddler simply because the police, who broke into his apartment and found a large quantity of heroin, neglected to first announce their purpose and authority in demanding entrance.

The point is worth repeating. Even if the particular officers in this present cause had been armed with the necessary warrant, a proper notification would have been required. Surely, it would be a fantastic absurdity to say that there are fewer restrictions on an officer proceeding without a warrant than would be the case if he had one.

Where the Identity of an Alleged Informer Is Material to the Establishment of Probable Cause, the Court Should Require Disclosure.

In their testimony the officers attempted to justify their actions on the basis of information allegedly supplied them by an "informer" (R. 19, 40, 41). The Petitioner specifically requested that he be afforded the identity of this alleged informer and even initiated a line of inquiry designed to attain that end. In view of the Court's ruling on the State's objection, such information was not forthcoming. Now the rule that an informer's tip may supply "probable cause" for an arrest and search must be regarded as subject to numerous qualifications. See, *Jones v. United*

States, 362 U. S. 257 (1960), *Draper v. United States*, 358 U. S. 307 (1959). The narrow purview of our discussion at this juncture is concerned with the propriety of the Court's ruling against the disclosure of the identity of the alleged informer.

At the outset it is clear that Ohio does not give a statutory privilege of confidentiality as between the police and an informer. Revised Code of Ohio, § 2317.02. Further the Ohio Supreme Court has expressly held in a long line of cases that "* * * a privilege against testifying or producing evidence must rest upon some statutory or constitutional provision." *Re: Story*, 159 Ohio St. 144, 111 N. E. (2) 385 (1953).

From a bare reading of Ohio's privilege statute which does not expressly confer such status to the policeman-informer relation, the mere invocation of the doctrine of "expressio unius est exclusio alterius" should be most compelling. Be that as it may, even in jurisdictions where the privilege exists, the disclosure of the identity is required in order to allow a challenge to the validity of an arrest or the propriety of the issuance of a warrant. This limitation on the applicability of the privilege arises from the fundamental requirements of due process. The problem has been said to involve the balancing of the public interest, in protecting the flow of information, against the individual's rights to have issues raised by his defense properly determined. *McCormick on Evidence*, § 148.

The constitutions of both Ohio and the Federal government prohibit the issuance of warrants except upon "probable cause." This thought is also memorialized by statute in the Ohio Revised Code, § 2933.22. In this regard, one of the prime issues raised by our Motion in the Trial Court, and both of the Appellate Courts, was the alleged

non-existence of probable cause. Certainly in this posture, the reliability of the informant, the credibility of the police officer who claims he acted upon the information disclosed, and the soundness of the reason for reliance upon this so-called information, are proper matters for exploration by the defense. Thus it is the law that an accused is entitled to know the identity of the informer, to compel his testimony and to impeach his credibility. *Roviaro v. United States*, 353 U. S. 53 (1957).

As was declared by one authority: If the prosecution is not required to divulge the name of an informant when one is arrested on the alleged ground of "confidential information," the way is left open for the "phantom informer." Further, that although this possibility may be remote, the fact that the possibility exists at all, when it can be eliminated, violates the American concept of justice in a criminal trial. *People vs. Lawrence*, 149 Cal. App. (2d) 435, 308 Pac. (2) 821 (1959). Cf., *Priestly vs. Superior Court*, 50 Cal. (2d) 812, 317 Pac. (2) 796 (1957).

When the identity of an informer becomes material to the establishment of a defense, the Court should order its disclosure. This, of course, is perfectly consistent with this Court's views as expressed in *Roviaro* (cited above).

Certainly where a determination of the lawfulness of a search and seizure depends upon the disclosure of the identity of the individual who allegedly gave information which led to the search and seizure, failure to require such person's identity to be disclosed, should render the search unlawful and result in a requirement that the evidence obtained from the search and seizure be excluded. *United States vs. Blich*, 45 Fed. (2d) 627 (1930, DC Wyo.).

By the Court not requiring disclosure, the status of this alleged confidential source became reduced to an anonymity. Certainly, if identity were disclosed, the de-

fense could have explored the reliability of the informer, produced evidence to rebut any such showing as well as further show that reasonable grounds for reliance did not exist. Further, it is just as important to a defendant to have access to a material witness who may satisfy the Court that evidence against him should be excluded, because obtained by unconstitutional means, as to have access to a material witness who may give evidence which will overcome in the eyes of a jury, for example, prosecution evidence against him on the merits of the charge.

CONCLUSION.

We are therefore left, upon an objective examination of the evidence, with an arrest executed without a warrant and without reasonable ground for believing a sufficient crime had been committed; with a search conducted without consent and without warrant or other process of law and in defiance of the constitution.

The Supreme Court of the United States has ruled, "That all evidence seized in violation of the constitution, is by that same authority, inadmissible in a State Court." Thus the "exclusionary rule" has, by the command of the Federal constitution become the law of the State of Ohio.

It follows as a most compelling conclusion that the only evidence against the Petitioner was the product of an unconstitutional search. Such being the case it is also most clear that if this evidence had been properly excluded, evidence to justify a conviction would have been "conspicuous by its absence." Fortunately, as an Appellate Court and with the power of judicial hindsight the error can be rectified. With a total absence of credible evidence to support the charge, this Court should remand the cause to the State Court with proper instructions as to any future disposition.

Wherefore, Petitioner respectfully prays that a writ of certiorari be issued under seal of this Court directed to the Supreme Court of Ohio to the end that the judgment of the Ohio Courts may be reviewed and reversed if such is indicated by this Honorable Court.

JAY B. WHITE,
Attorney for Petitioner.

JAMES R. WILLIS,
Of Counsel.

APPENDIX I.

ORDER OF SUPREME COURT OF OHIO DISMISSING APPEAL.

This cause, here on appeal as of right from the Court of Appeals for Cuyahoga County was heard in the manner prescribed by law and upon motion of the appellee to dismiss such appeal.

On consideration thereof, such appeal is dismissed for the reason that no debatable constitutional question exists herein.

TAFT, C. J. and ZIMMERMAN, MATTHIAS, O'NEILL, GRIFFITH and HERBERT, JJ., concur.

APPENDIX II.

ORDER OF THE SUPREME COURT OVERRULING MOTION FOR LEAVE TO APPEAL.

It is ordered by the Court that this Motion is overruled.

APPENDIX III.

JOURNAL ENTRY OF THE COURT OF APPEALS OF OHIO, EIGHTH DISTRICT, COUNTY OF CUYAHOGA.

April 1, 1963.

This cause came on to be heard on the appeal on questions of law from the judgment and sentence of the Common Pleas Court and was argued by counsel for the parties; and upon consideration, the Court finds no error prejudicial to the appellant and therefore the judgment and sentence of the Common Pleas Court are affirmed and it is ordered that appellee recover of appellant its costs herein taxed.

The Court finds there was reasonable grounds for this appeal.

It is ordered that a special mandate issue of this Court directing the Common Pleas Court to carry this judgment into execution. Exceptions.

JOY SETH HURD,
Presiding Judge.